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PROPERTY LAW: 2013-2014

VOLUME TWO

J. Phillips
Faculty of Law
University of Toronto

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CHAPTER SIX

SERVITUDES PART 1 - EASEMENTS

A) INTRODUCTION

An easement is one of the class of rights in land known as "incorporeal hereditaments", or sometimes as "servitudes". It is a "use" right - the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration.

Imagine that A owns land bordered on three sides by woods, and on one side by a road. A wishes to sell part of the land, and B wishes to buy part of it. But A wants to sell a part that does not border on the road. B is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods assuming that B has a right to go through the woods. If not, a helicopter will be required. The solution is simple as part of the agreement by which she buys the land from A, B also obtains the right to cross A's land to get to the road. Presumably A will extract some price for this, some increase in B's purchase price, but it matters not to the law whether payment is given, only that the agreement has been made.

Easements are a relationship between two parcels of land - the dominant tenement and the servient tenement. In this example the land that is reached by crossing the other parcel is the dominant tenement; the land that is crossed is the servient tenement, it serves the dominant tenement.

If an easement has been created by one of the methods acceptable to the law (an issue dealt with in sections (c) and (d) of this chapter), and if the right granted meets the necessary test as being the kind of thing allowed by the law of easements (an issue discussed immediately below in section (b)), then it will generally run with the land, be a part of title. That is, if the easement is created during the period that A and B own the two pieces of land, and A then sells to C and B sells to D, C

and D are in the same position as landowners as A and B were. This is what makes the easement a property right, for the original agreement between A and B could be enforced merely as a contract, as could any other agreement between them. But if the particular right created by the initial contract is an easement, it becomes part of the title, part of the fee simple that each successor owner has, it has an existence independent of the identity of the owner of the land at any given time.

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B) CHARACTERISTICS OF EASEMENTS

The first issue we will look at is that of what kinds of rights the law will consider to constitute valid easements. The common law will not simply consider any agreement between two landowners to have created an easement. To qualify, the right granted must meet the four fold test laid out in Ellenborough Park below. In that case there was no question that an agreement was made between vendors and purchasers in 1855; but only if that agreement created a right in the nature of an easement can it still be enforced 100 years later. The four principal requirements are laid out below, and you should make sure that you understand what each means and how the court assesses them in light of the facts of the case.

IN RE ELLENBOROUGH PARK, [1956] 1 Ch. 131 (C.A.)

In 1855, Ellenborough Park at Weston super Mare and the surrounding property, being freehold land then open and unbuilt on, belonged to two tenants in common who sold, for building purposes, the plots surrounding the park. The conveyances of the plots were in similar form granting to each purchaser "the full enjoyment at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground [Ellenborough Park] ... but subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground." Each purchaser covenanted to pay a fair proportion of the expenses of making the pleasure ground and at all times keeping it in good order and condition and well stocked with plants and shrubs. The vendors covenanted with each purchaser, his heirs, executors, administrators and assigns, at the expense of the purchaser, his heirs, executors, administrators or assigns and all others to whom the right of enjoyment of the pleasure ground might be granted to keep Ellenborough Park as an ornamental pleasure ground. Danckwerts J. held that the right to use the pleasure ground was a right known to the law and an easement, and that accordingly the purchasers of plots and their successors in title had legal and effective easements so to use Ellenborough Park.

CHAPTER SEVEN

SERVITUDES PART II - RESTRICTIVE COVENANTS

A) INTRODUCTION

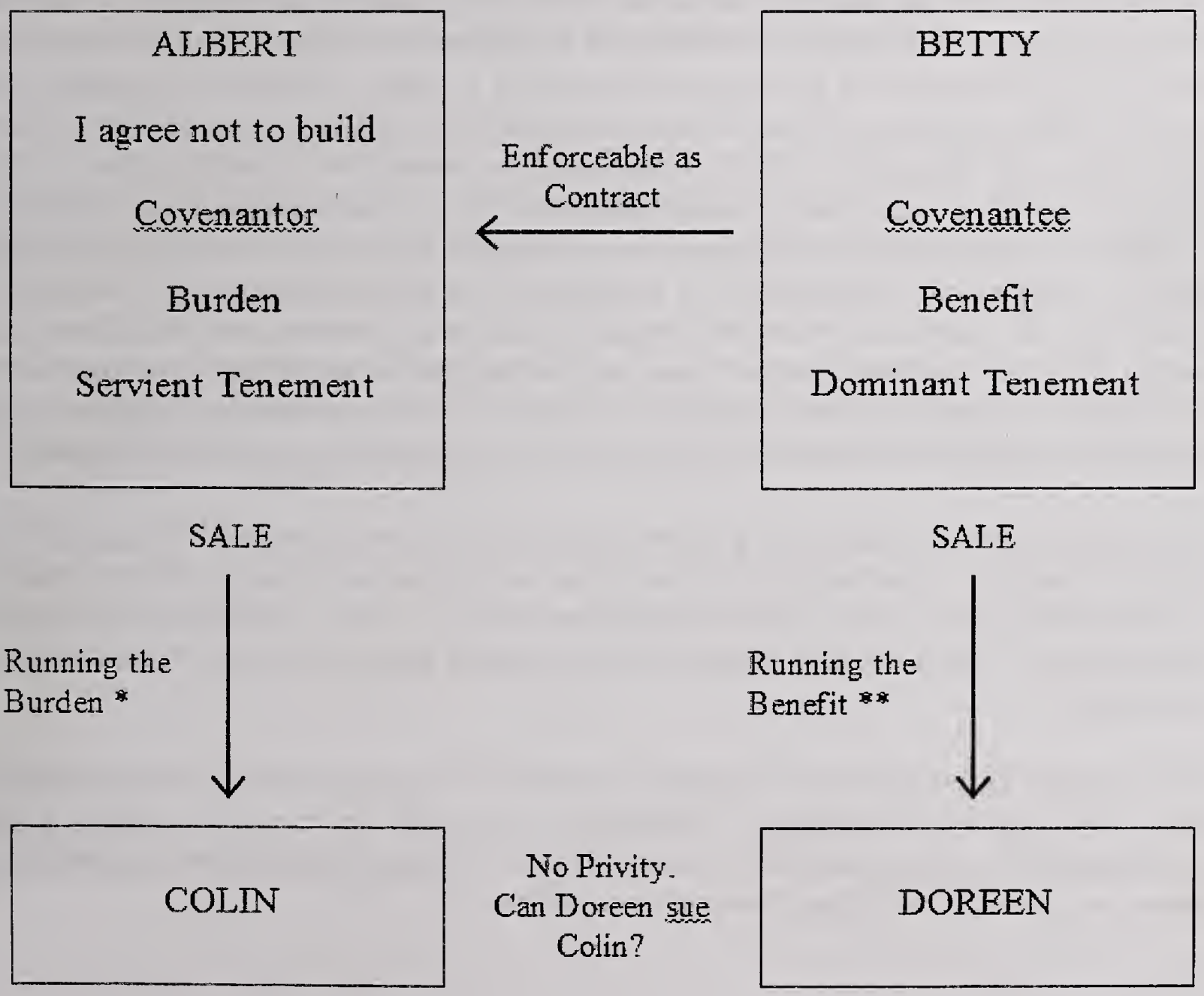
Restrictive covenants are, like easements, a form of incorporeal hereditament. Begin with the notion that a covenant is an agreement under seal, one contained in a deed. In the context of real property law, it is an agreement by which one person agrees to do something, or not to do something, with his or her land, for the benefit of the other party. As with an easement created by express grant, we can use contract law to say that the terms of the covenant are enforceable as between the original parties. But, again similarly to an easement, the issue is when the terms of the covenant become attached to the land, as part of title to it, and are therefore enforceable by and against successors in title to the original contracting parties. That is, at what point will the law consider the covenant to be an interest in land so that it can be enforced between parties who have no privity.

An obvious question which will occur to you at this point is - what is the difference between covenants and easements? I am not going to answer this fully at the moment, because the entire answer requires us to understand the whole chapter. But for the present you can usefully think of a covenant as (a) requiring an owner to do something or not do something with his or her own land, whereas an easement gives its holder the right to go onto another's land, and (b) as an agreement containing terms and conditions that would not amount to an easement by the characteristics outlined in *Ellenborough Park* or because of the restrictions on negative easements noted in *Phipps* v. *Pears*. There are other differences, but the point is that covenants principally affect servient land, while easements only do so inferentially, and that covenants are potentially much wider in scope than easements - although there are limits on which type of covenants can go with title. We will see that covenants are much more difficult to enforce against successors-in-title than easements, and thus you would never attempt to argue that something like a right of way was a covenant.

A paradigm restrictive covenant (that's a term of art which will be explained later) would be a limit on the kind of development that one land owner could undertake. That is, you own land and sell half of it off. You know the purchaser is a would want to build on it. You insert a clause in the conveyance that would prevent this.

Covenants and easements are often used together, the former helping to reinforce the limits on the servient owner implied by the easement. For example, in the *Ellenborough Park* case, as well as granting the residents the right to use the park as a garden, the deed also contained a covenant by the original vendors "against building on the park and to the effect that the park should at all times remain as an ornamental garden".

At this stage we need to introduce some terms. The covenantor, the person who agrees to do something or not to do something, has what is called the burden of the covenant. The covenantee, the person for whose benefit the covenant is made, has what is called the benefit of the covenant. Enforcing the burden and being able to enforce the benefit against or for a successor in title to the original party is known as running the burden or the benefit of the covenant.



Restrictive covenants are a form of private zoning. As Ziff succinctly puts it, they "can be useful instruments in the hands of a 'nimby' ": Ziff, *Principles of Property Law*, fourth edition, p. 401. Despite the introduction of public zoning they remain part of the law and are widely used. They are used for a variety of ends. They have been used in the past to enforce racial segregation - refer back to *Re Noble and Wolf*. Their principal past and present use has been to enforce class, not racial, segregation. This point is nicely illustrated by the judgment of Brodeur J in *Pearson* v. *Adams*, (1914), 50 S.C.R. 204. In a deed of sale of land on Maynard Avenue in Toronto it was stipulated that the lot was "to be used only as a site for a detached brick or stone dwelling house, to cost at least two thousand dollars, to be of fair architectural appearance and to be built at the same distance from the street line as the houses on the adjoining lots." Pearson bought a lot on the street and "erected a first-class private dwelling house costing approximately $14,000, over and above the value of the land." Adams wanted to build a 6-unit apartment house on the adjoining land, and Pearson applied for an injunction to prevent this. The issue was whether such a building was a "dwelling house" within the meaning of the covenant. A majority of the Supreme Court of Canada said that it was not. In the course of his judgment Brodeur J. stated: "When the contract was made, in 1888, apartment houses were not being built in the City of Toronto. There were flats and tenements which were used or leased by a certain class of the population. There was also the detached house which was used for the residence of one family. Those detached houses were necessarily more expensive than the others and were supposed to be used by a wealthier class of the community. There is no doubt that Mr. Maynard, when he opened the street in question and sold those lots, had in view the establishment of a nice residential quarter and those covenants were stipulated evidently for that purpose. He did not want to have any flats nor any tenements erected on those lots which would be occupied by two or three lessees."

Although rooted in notions of preserving neighbourhoods and environments at a certain "quality," covenants also serve what we would now call environmental or conservation goals. Later in this chapter we will look more closely at one modern development - the statutory changes which permit people to create "conservation covenants."

We turn now to the rules on "running" covenants - enforcing them down the chain of title when there is no privity. Regrettably, the rules on running covenants are "unnecessarily complex and occasionally illogical": Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land*, 1989, p. 1.

The common law historically never allowed the burden of any covenant to run and this rule still pertains. Thus while a landowner could enforce an agreement made with a neighbour on the basis of contract law, he or she could never enforce that same agreement against a person who bought the land from the neighbour. The common law would allow the benefit to run down the chain of title if certain conditions were met, but this is a relatively unimportant point. What matters is enforcing the burden, enforcing the restriction on use that is at the core of the covenant.

As one aspect of its willingness to develop supplemental rules to those of the common law (see above chapters 4 and 5), the court of equity began to allow some burdens to run in the early to mid nineteenth century. Initially all that was required was that the successor in title to the covenantor have notice of the covenant. Over time additional requirements were added. The following sections deal with the equitable requirements for running the burden. This is where the term of art "restrictive covenants" comes in. A restrictive covenant can be defined as a covenant that equity will enforce against successors in title to the original covenantor.

to be enforced by an assign from him, such assign must always prove his right to sue, whether by virtue of annexation, by devolution, by assignment of the benefit of the covenant. The plaintiff may also ... have to show that he retains property for whose benefit the covenant was imposed. These are matters which arise in all cases where restrictive covenants are sought to be enforced otherwise than as between the original parties, and I see no greater difficulty in dealing with them in cases such as the present."

While any pronouncement of so eminent a jurist as Lord Wilberforce deserves the utmost deference, it cannot be permitted to prevail against the law as enunciated in our own Court of last resort. I am not in the least impressed with the submission of appellant's counsel that the judgment of the Supreme Court of Canada in the Madawaska case, supra, would have been different had the members of that Court been aware of the decision of Wilberforce, J., in the Marten case. Our Courts have recognized that the purchaser of land needs to know before he is sued, or, indeed, before he forms a decision whether or not to breach a particular covenant, or to purchase property burdened with it, who is the person who will seek to enforce it, and what parcel of land is claimed to enjoy the benefit of the covenant. Will a search in the Registry Office provide the solution? Charges of this nature are registered against the name of the owner whose estate is intended to be burdened, i.e., the covenantor. The name of the covenantee will appear in the title deeds, but it may not be possible to trace him or otherwise ascertain the identity of the land to be benefited. It is much more satisfactory for the purchaser of the encumbered land to be provided with an indication in the deed to show which is the land to be benefited. He is placed in a most precarious position if he must first breach the covenant and then wait in fear and trembling to see if he is to be sued.

The view taken by the Supreme Court in the cases referred to, supra, reflects the more recent trend of thinking upon this subject.... I readily concur in the conclusion reached by the learned Judge of first instance that the covenant is invalid for the reasons assigned by him....

NOTE

In *Victoria University* v. *Heritage Properties Ltd.* (1991), 4 O.R. (3d) 655 (G.D.), Victoria University sold in 1981 to Heritage Properties Limited some lots on the north side of Charles Street West. The conveyance included the following covenant: "AND the Grantee COVENANTS with the Grantor, its successors and assigns, that, as a covenant running with the land, it will not erect or cause to be erected at any time on any portion of Lots 21, 22, 23, 24 or 25, Plan 97, Toronto, or on the part of Charles Street West closed by City of Toronto By-Law 38/70, any building having a height in excess of 20 metres, and the Grantee covenants and agrees to secure and register a similar covenant from any purchaser or assignee of the Grantee."

No dominant tenement, or land for the benefit of which the covenant was taken, was referred to in the covenant. Heritage Properties sold the land, and it ended up in the hands of Jasmac Canada Limited, which filed with the City of Toronto a development

application for an 11-storey hotel development. Victoria University applied for a declaration that Jasmac was bound by the covenant. It argued that the need to identify the dominant tenement did not apply where a successor in title had "actual knowledge of both the covenant and the benefitting lands." In addition, it argued that "while the covenantee must own land capable of being benefited, such benefitted land may be ascertained from the deed creating the covenant or from circumstances surrounding its execution which make the identity of the benefitted lands, or dominant tenement, readily apparent."

The trial judge held that he was bound by Sekretov and Galbraith v. Madawaska Club, which stated "in the plainest terms" that a "minimum requirement" was that "the deed itself must so define the land to be benefitted as to make it easily ascertainable." He also noted that "[t]he result is in accord with the policy reflected in the Land Titles Act, ... which provides ... that a restrictive covenant shall not be registered unless the covenantee owns land to be benefitted and that land is mentioned in the covenant."

NOTES

1) The most common form of restrictive covenant is a limitation on development, and therefore one can assume that such a covenant touches and concerns the land. But how much land? In *Earl of Leicester* v. *Wells-next-the-Sea Urban District Council* [1973] 1 Ch 110 the court accepted that restrictions on a 19-acre plot could benefit a 32,000 acre estate.

In *Re Ballard's Conveyance* [1937] Ch 473 building restrictions on an 18-acre plot were held not to be enforceable in favour of an estate of 1,700 acres. The court stated: "it appears to me quite obvious that while a breach of the stipulations might possibly affect a portion of that area in the vicinity of the applicant's land, the largest part of this area of 1,700 acres could not possibly be affected by any breach of any of the stipulations".

2) There is an interesting discussion of the background to Galbraith in P. Girard, "Cottages, Covenants and the Cold War: *Galbraith v. Madawaska Club*," in E. Tucker, J. Muir, and B. Ziff, eds., *Property on Trial: Canadian Cases in Context* (Toronto: Osgoode Society for Canadian Legal History and Irwin Law, 2012).

CHAPTER EIGHT

PROPERTY, POLITICS, THE CONSTITUTION AND THE STATE

A) INTRODUCTION

It is a commonplace of political philosophy that the western liberal tradition places great emphasis on the freedom of the individual. This freedom is often discussed in terms of freedom from control by others, especially the state. It is also often contended that private property serves a crucial role in protecting and enhancing such freedom. Professor Jeremy Paul, for example, states that property acts "as protector of individual rights against other citizens and as safeguard against excessive government interference": "The Hidden Structure of Takings Law", (1991) 64 *Southern California Law Review* 1393. The same point was made many years ago by Morris Cohen, one of the leading legal realists, who argued that private property gives those who have enforceable claims to resources power over their own lives and a measure of power over the lives of others: "Property and Sovereignty", (1927) 13 *Cornell Law Quarterly* 8.

The enhancement of individual liberty is therefore often cited as a justification for private property in general. More particularly, it also serves as an argument for putting into private hands as many as possible of the strands in the bundle of rights that property represents. But no society places the whole bundle in individual hands, for all recognise that to one degree or another individual property rights must give way to society's collective goals. This is most obviously achieved by taxation, but there are a host of others ways in which this is also done, some of which we have discussed above - see the debate over property and discrimination. The first substantive section of this chapter examines another area where public goals and private rights, or perhaps the private rights of the few and the private rights of the many, collide - takings.

The second section of this chapter examines a somewhat different, but related, aspect of the relationship between property and the state - the extent to which citizens should have some entitlement to a minimum level of property. This introductory note began by talking about property as providing freedom from government interference. But it has long been recognised that this negative liberty is not the only kind of liberty. There is also such a thing as positive liberty, the freedom to live a full life, which may

require the state to provide the means to do so. The second substantive section examines how a political theory that stresses "freedom to" might alter current conceptions of the relation between property and the state.

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B) FREEDOM FROM: THE LINE BETWEEN REGULATION AND TAKING

THE UNITED STATES CONSTITUTION

The first two "takings" cases are from the USA. The United States Constitution contains a specific protection for property. The fifth amendment reads in part: "...nor shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". This originally applied only to the federal government, but it was extended to the states, in part explicitly and partly by implication, by the fourteenth amendment (1868). In short, the state may take property from the citizen provided that this is done for a public purpose, such as a highway, and provided fair compensation is paid.

We are not concerned here with the intricacies of the law relating to what a public purpose is or to how compensation is calculated. The *Pennsylvania Coal* and *Keystone* cases are about whether the government has taken property at all. If it has not, no compensation need be paid. This may sound like an easy question, but the cases show that it is not. What causes the difficulty is that almost any regulation by government of any aspect of social or economic life will affect in some way the property rights of some person or persons. Anti-pollution laws, for example, limit what uses an owner can make of land and in that sense remove a strand from the owner's bundle of rights. But this is not considered a taking - or at least not generally so, for one can find, in the US in particular, people who say that practically any regulation is a taking.

But if "all regulations are takings" is too extreme a position, it is also the case that most people would agree that the converse - regulation can never amount to a taking - is also too extreme. This position would state that the government does not "take" from the citizen unless it acquires title to land or personal property. But this would permit the state to prohibit every use, and thereby render ownership worthless, without paying compensation.

NOTE: Estey J.'s judgment is the majority in Tener. Wilson J., for herself and Dickson C.J.C., concurred in the result. She first held that the interest in question was a *profit a prendre*, the right to go onto another's land and take "therefrom a profit of the soil". (A *profit a prendre* is a form of incorporeal hereditament, like an easement). In this case the profit comprised "both the mineral claims and the surface rights necessary for their enjoyment". She stressed that the holder of the profit does not own the product of the soil while it remains in the soil; he or she owns only the claim, the right to exploit the product, to sever it from the soil. She then noted that the regulation prevented the holder of the profit from going onto the land and severing the minerals. After a review of the legislative scheme, she found that the government action constituted an expropriation as that term was defined in the *Park Act*. That is, "the absolute denial of the right to go onto the land and sever the minerals so as to make them their own deprives the respondents of their profit a prendre. Their interest is nothing without the right to exploit it" because the minerals in the ground did not belong to the holders of the claims: "Severance and the right of severance is of the essence of their interest". In coming to this conclusion she rejected an argument that the crown's action was merely regulation, akin to zoning. While giving or refusing a licence might be often so characterised, "it cannot be viewed as mere regulation when it has the effect of defeating the ... entire interest in the land". That is: "Without access the respondents cannot enjoy the mineral claims granted to them in the only way they can be enjoyed, namely by the exploitation of the minerals .... The reality is that the respondents now have no access to their claims, no ability to develop and realize on them and no ability to sell them to anyone else.... They are worthless".

On the issue of whether the crown had acquired what had been taken, Wilson J thought that *Manitoba Fisheries* was the "complete answer". Just as Manitoba Fisheries' customers had been forced to do business with the new crown corporation, thereby effectively transferring the former's goodwill, so here, by depriving the holder of the profit of the right to go onto the land and sever the product from it, "the owner of the fee [the crown] has effectively removed the encumbrance from its land". The doctrine of merger - whereby the lower interest (the profit) is absorbed into the higher (the fee simple) "operates so as to make the respondents' loss the appellant's gain". In short, when it granted the mineral rights the government had granted a right to use the surface; when it enacted the regulation it had not only removed that right, it had effected a reversion of the right to itself as owner of the fee simple. It had removed a burden on its own land, and that burden was the very property which had been taken from the citizen.

CHAPTER NINE - ABORIGINAL TITLE

A) INTRODUCTION

This chapter provides a necessarily brief introduction to the subject of aboriginal title to land. By the time we get to this chapter many of you will have done the general subject of aboriginal rights in constitutional law. Others will do it after we do aboriginal title. Most of the constitutional law teachers do not cover aboriginal title, so you are getting two different aspects of aboriginal rights from two different sources. This actually makes sense; aboriginal title is part of the Canadian law of property, and indeed it is a common law concept, not a constitutional one, in its origins. *Calder*, the first case we will read and which in the modern era established that there was such a thing as aboriginal title, predates the passage of section 35 of the *Constitution Act*. And, as that case explains, the idea that the common law recognises an aboriginal title is a very old one.

Having said that, since 1982 aboriginal rights, including aboriginal title, have been entrenched in section 35 of the Constitution. As a result, aboriginal title has become a constitutional issue as well as a matter of property law. The leading Supreme Court of Canada case on aboriginal title, *Delgamuukw*, brings together the common law of aboriginal title and the constitution.

Reference has been made above to both aboriginal title and aboriginal rights. The former is now seen as one form of aboriginal right. According to the Supreme Court of Canada in *R.* v. *Van der Peet*, it represents 'the way in which the common law recognizes aboriginal land rights.' The court also stated: 'aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land.' In this definition, therefore, 'aboriginal rights' is a general term, and 'aboriginal title' is a specific instance of an aboriginal right. However, in some cases 'aboriginal rights' is, confusingly, also a term that refers to specific land use rights, less than title - for example, a right to hunt or to fish.

We will read only three cases for this section of the course: *Calder* (below), *Guerin*, and *Delgamuukw*. The latter two are in the constitutional law casebook, and we will use that text for them. However the constitutional casebook does not contain much on the facts of the case, and as they are useful to know, they have been added at the end of

this chapter.

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B) ABORIGINAL TITLE AT COMMON LAW: CALDER ET AL v. ATTORNEY-GENERAL OF BRITISH COLUMBIA (1973), 34 D.L.R. (3d) 145 (S.C.C.)

A short description of aboriginal title would be:

i) The absolute, or 'radical,' title to all land within the state, including land over which any aboriginal title or right may exist, belongs to the Crown. This "radical" title is the ultimate Crown title out of which the estates which we have studied are carved.

ii) Aboriginal title is a burden on this radical or absolute title, giving aboriginal peoples rights in the land.

iii) Having stated proposition (ii), courts traditionally (pre-*Delgamuukw*) had difficulty stating precisely what aboriginal title is. It was clearly established that it was not an estate held in tenure from the Crown. It was equally not a purely personal 'usufruct' interest (a right of use) held by individual aboriginal people. The most detailed assessment of what aboriginal title is comes in the *Delgamuukw* case, which we will read later. The early cases discussed in this section give you very little sense of the content of aboriginal title, but they are important for establishing that it does exist in the common law.

Calder is the first modern case in which the Supreme Court of Canada recognised the existence of aboriginal rights in land arising at common law (that is, independently of any treaty of legislative enactment) even though at the time only a minority of the judges clearly accepted this notion. In *Calder* the issue was whether the Nisga'a people of British Columbia possessed aboriginal rights to their traditional lands in the Naas River Valley. The ultimate result of Calder, nearly thirty years on, was the *Nisga'a Final Agreement Act* of 2000, a modern treaty.

The action was dismissed at trial, and the Court of Appeal rejected the appeal. The Supreme Court of Canada split three-three, with the seventh member of the Court, Pigeon J., expressing no opinion on the substantive issues and holding against the Nisga'a on a procedural ground. Judson J., Martland and Ritchie JJ concurring, first